United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 21, 2005

TO : Gerald Kobell, Regional Director
Region 6

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 530-6067-2060-8400
530-6067-2080-6200

SUBJECT: Kane Manufacturing 530-6067-4001-1700
Case 6-CA-34558 530-8045-3725

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) when it insisted to impasse and unilaterally announced implementation of a management rights provision that would give the Employer complete discretion to subcontract or transfer work and to determine the effects of any subcontracting, work transfer, or other exercise of any management right.[1]

We conclude that the Employer did not violate Section 8(a)(5) when it insisted to impasse and unilaterally announced implementation of its management rights proposal. However, this management rights provision would not privilege the refusal to bargain over any future subcontracting, work transfers, or the effects of management decisions, absent bargaining over the criteria and procedures to be used in taking such actions.

FACTS

Kane Manufacturing (the Employer) produces a variety of security screens at two facilities in Kane, Pennsylvania. The production and maintenance employees at one of these facilities (K-1) have long been represented by United Steelworkers of America, Local Union 8166-33 (the Union). The employees at the other Kane facility (K-2) are not represented for the purposes of collective bargaining. At least some of the work currently being performed by unit employees at K-1 could be done at K-2.

The Employer and the Union's most recent collective-bargaining agreement covering the K-1 unit expired in September 2004. Bargaining for a successor agreement commenced in August 2004. The Employer's proposal included

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[1] The Region also sought advice as to the appropriate remedy for the alleged unilateral implementation violation. As we conclude that the Employer did not violate the Act, any remedial issues are moot and need not be addressed here.

a variety of reductions in wages, benefits, and other terms and conditions of employment. In particular, the Employer proposed broadening the agreement's management rights clause to give the Employer the unilateral right to subcontract work or transfer work to other plants, as well as to unilaterally determine any and all effects on unit employees from its exercise of any of its management rights, except as specifically limited by the terms and conditions of the agreement. The Employer also proposed deleting prior contract language that prohibited the Employer from laying off any unit employees as a result of transferring work or equipment from K-1 to K-2.

Over the next several months of bargaining, each side made some movement in areas other than those discussed above, but, as the Region has determined, the parties reached impasse in March 2005.[2] On March 14, the Employer announced that it was implementing its final offer, including its management rights proposal. Since March, the parties have not engaged in any further bargaining over the agreement, and the Employer has not proposed any criteria or procedures it would use in making any decision regarding subcontracting, transfer of work, or the effects of any exercise of its management rights. The Employer has not taken any action based upon its management rights proposal.

ACTION

We conclude that the Employer did not violate Section 8(a)(5) when it insisted to impasse and unilaterally announced implementation of its management rights proposal. However, this management rights provision would not privilege the refusal to bargain over any future subcontracting, work transfers, or the effects of management decisions, absent bargaining over the criteria and procedures to be used in taking such actions.

The Employer did not violate the Act when it insisted to impasse on its management rights proposal.

Initially, we agree with the Region that the Employer did not violate the Act by insisting to impasse on its management rights proposal. In American National Insurance Co.,[3] the Supreme Court held that it was not unlawful, per

[2] This conclusion has not been submitted for advice. All dates hereinafter are in 2005, unless otherwise noted.

[3] NLRB v. American National Insurance Co., 343 U.S. 395, 408-09 (1952).

se, for an employer to insist upon a management rights clause that excluded from arbitration such matters as promotions, discipline, and work scheduling. The Court stated that it is "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."[4]

Of course, as stated in Reichhold Chemicals, Inc.,[5] the Board will "examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract." Thus, in A-1 King Size Sandwiches,[6] the Board found a violation of Section 8(a)(5) based upon the ALJ's finding that the employer's proposals "would strip the Union of any effective method of representing its members."[7] In that case, the employer insisted on unilateral control of wages; manning; scheduling and hours; layoff, recall and the granting and denial of leave; promotion, demotion, and discipline; the assignment of work outside the unit; and changes of past practice. The employer's contract proposal also contained a broad no-strike clause and an "essentially illusory" grievance-arbitration procedure. Under this type of proposal, the union would have "no voice whatsoever concerning any facet of the employment relationship."[8]

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[4] 343 U.S. at 404. See also McClatchy Newspapers, 321 NLRB 1386, 1388-1392 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998) (no violation to insist to impasse on merit wage proposal, although implementation after impasse violated Section 8(a)(5)); University of Pittsburgh Medical Center, 320 NLRB 122, 122-123 (1995) (employer lawfully insisted on proposal giving it right to unilaterally subcontract unit work).

[5] 288 NLRB 69 (1988), petition for review denied in pertinent part sub nom. Teamsters Local 515 v. NLRB, 906 F.2d 719, 726 (D.C. Cir. 1990).

[6] 265 NLRB 850 (1982), enfd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1084 (1984).

[7] 265 NLRB at 859, quoting from San Isabel Electrical Services, 225 NLRB 1073, 1080 (1976).

[8] Reichhold Chemicals, Inc., 288 NLRB at 71.

In the instant case, in contrast, the Employer's proposal was not clearly designed to frustrate agreement on a collective-bargaining contract. While the Employer's management rights proposal would give the Employer the unilateral right to subcontract or transfer work to other plants and to unilaterally determine the effects on unit employees of any exercise of management rights, except as limited by the other terms and conditions of the agreement, the Union would continue to have the same representative role in all other areas that it had agreed to in the expired collective-bargaining agreement, including grievance/arbitration rights covering almost all terms and conditions of employment. Moreover, many of the most central subjects commonly raised in effects bargaining were already addressed in the parties' expired collective-bargaining agreement and continued in the Employer's proposal, including provisions covering severance pay, the eligibility of laid-off employees for health insurance and other benefits, and the use of seniority order for layoffs, recalls, and bumping rights.[9] Therefore, we agree with the Region that the Employer's final proposal, including the proposed management rights provision, does not demonstrate "an overall intent to frustrate the collective-bargaining process,"[10] and that the Employer did not violate the Act by insisting to impasse on its management rights proposal.

The Employer did not violate the Act when it announced implementation of its management rights proposal.

We further conclude that the Employer also did not violate the Act in March, when it announced that it was implementing its final offer, including its management rights proposal.

In McClatchy Newspapers, supra, the Board held that, in the absence of good-faith bargaining over criteria and procedures, discretionary merit increases fall into a narrow class of proposals concerning mandatory subjects

[9] While the severance pay and certain other of these provisions may not be excessively generous, particularly given the distinct possibility of the Employer transferring work from its Union K-1 facility to its non-union K-2 facility, they nonetheless address significant effects bargaining subjects and provide distinct limitations on the Employer's discretion in these areas.

[10] Reichhold Chemicals, Inc., 288 NLRB at 71.

that cannot be implemented after impasse.[11] The employer's proposal in that case gave the employer broad, ongoing discretion to change wage rates, and provided no standards or criteria that would limit this discretion. It also exempted all pay decisions from contractual grievance and arbitration procedures, and placed other restrictions on the representational role of the union in the merit-determination process.[12] The Board in McClatchy explained that the doctrine of post-impasse implementation of employer proposals was developed as a means of fostering the collective-bargaining process by helping to break impasse.[13] It noted, however, that where post-impasse implementation would seriously harm, rather than further, the bargaining process, the doctrine should not and does not apply.[14] The Board concluded that an employer could not implement proposals giving it unlimited discretion (i.e., without explicit standards or criteria) over future pay increases; permitting it to do so would undermine, rather than foster, the collective-bargaining process.[15] In McClatchy, the Board specifically noted that nothing in its decision precludes an employer "from attempting to negotiate to agreement on retaining discretion over wage increases," or, failing to achieve such an agreement, "from [implementing such a proposal] if definable objective procedures and criteria have been negotiated to agreement or to impasse," because, in such cases the union will have "retain[ed] its ability to act as bargaining representative."[16]

In KSM Industries,[17] the Board extended the McClatchy rationale to a non-wage proposal, holding that the employer lawfully bargained to impasse over, but could not

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[11] 321 NLRB at 1390.

[12] Id. at 1386-1387.

[13] Id. at 1389-1390.

[14] Id. at 1390 (citing arbitration, union security, dues checkoff, no-strike provisions, and withdrawal from multi-employer bargaining as "exceptions to the implementation-after-impasse doctrine [that] carry as their underlying theme the need to foster the collective-bargaining process").

[15] Id. at 1390-1391.

[16] Ibid.

[17] 336 NLRB 133 (2001).

implement, a medical and dental insurance proposal.[18] The Board found that the implemented health benefits proposal left no room for bargaining about the manner, method, and means of providing medical and dental benefits during the term of the contract.[19] Accordingly, as in McClatchy, the proposal nullified the union's authority to bargain over the existence and terms of a "key" employment condition and rendered its implementation "inimical to the post-impasse, on-going collective-bargaining process."[20] We have previously applied the analysis set forth in McClatchy and KSM Industries to broad discretionary subcontracting provisions.[21]

The Board has made it clear, however, that there is no violation under McClatchy and KSM Industries until the employer actually takes some action that would require bargaining but for the unilaterally implemented proposal.[22] In Woodland Clinic, the Board dismissed a complaint alleging a McClatchy violation in the unilateral implementation of a broadly discretionary merit wage system, holding that, "[a]bsent evidence that the Respondent actually granted merit wage increases to unit employees, there is no basis for finding a violation of the

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[18] Id. at 135. The Board noted that health insurance, like wages, is a mandatory subject of bargaining and an important term and condition of employment. Therefore, the Board found KSM's proposal akin to the merit wage proposals in McClatchy and stated that there was "no principled reason" to distinguish McClatchy on the basis that health insurance rather than wages was involved. Id. at fn. 6.

[19] Ibid.

[20] Ibid. Cf. Monterey Newspapers, 334 NLRB 1019, 1021 (1991) (successor's setting "tightly circumscribed" pay band system for new hires distinguishable from Board merit-pay cases involving unfettered employer discretion).

[21] See, e.g., Rotorex Co., Case 5-CA-27338, Advice Memorandum dated April 9, 1998, at pp. 12-13. See also Fairfield Tower Condominium Association, 343 NLRB No 101 (2004), in which an ALJ applied McClatchy to subcontracting (slip op. at 7), but the Board did not reach the issue as it found no bona fide impasse (slip op. at 3).

[22] See Woodland Clinic, 331 NLRB 735, 740-741 (2000); Bakersfield Californian, 337 NLRB 296, 297-298 (2001).

Act under McClatchy."[23] Thus, the violation is made out by the employer's "actual implementation" of a unilateral change,[24] not by the employer's mere announcement of a unilateral right to make future changes.

In the instant case, of course, it is undisputed that the Employer has not actually taken any action based upon the management rights provision at issue. Therefore, as in Woodland Clinic, there has been no violation of the Act, and this allegation should be dismissed in the absence of any actual change in unit employees' terms and conditions without required bargaining.

While the Employer's unilateral announcement of implementation of its management rights proposal does not violate the Act in the absence of any action based upon it, we emphasize that the announced implementation does not relieve the Employer of its future bargaining obligations, as set forth in McClatchy. Thus, the announced unilateral implementation would not privilege the Employer to make unilateral changes in, or otherwise refuse to bargain over, mandatory subjects of bargaining about which it is otherwise required to bargain with the Union, and any such conduct would violate Section 8(a)(5). Should the Employer actually implement a work transfer or new subcontracting without bargaining over standards or criteria, this would violate Section 8(a)(5). Regarding effects, although many subjects commonly raised in effects bargaining are specifically addressed in the parties' expired collective-bargaining agreement and in the Employer's proposal,[25] there may be other issues that arise in which the Employer's discretion is not limited and the McClatchy analysis would therefore be appropriate. Thus, if the Employer acts in determining the effects of some exercise of its management rights, based upon broad unilaterally-arrogated discretion not limited by objective criteria or procedures, such action may make out a McClatchy violation at that time.

Accordingly, consistent with the analysis set forth above, the Region should dismiss the allegations that the Employer violated Section 8(a)(5) when it insisted to

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[23] 331 NLRB at 741.

[24] Id. at 740.

[25] This includes provisions covering severance pay, the eligibility of laid-off employees for health insurance and other benefits, and the use of seniority order for layoffs, recalls, and bumping rights.

impasse and unilaterally announced implementation of its management rights proposal.

B.J.K.